

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 93-178

In the Matter of )  
 )  
Implementation of Sections 12 and 19 ) MM Docket No. 92-265  
of the Cable Television Consumer )  
Protection and Competition Act of 1992 )  
 )  
Development of Competition and )  
Diversity in Video Programming )  
Distribution and Carriage )

FOOTMAN SECTION  
MAY 3 12 11 PM '93

FIRST REPORT AND ORDER

Adopted: April 1, 1993; Released: April 30, 1993

By the Commission: Commissioner Marshall not participating; Commissioner Barrett issuing a separate statement.

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## **I. INTRODUCTION**

1. This Report and Order adopts rules to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new Section 628 prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming to the Communications Act of 1934.<sup>1</sup> Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.

2. Section 628(a) states that the purpose of this provision "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." Section 628(b) states that

it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

3. Section 628(c) instructs the Commission to adopt regulations to specify

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<sup>1</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992). This Report and Order will not address carriage agreement issues raised by Section 12 of the Act on which the Commission also sought comment in this proceeding. Although the carriage agreement and program access provisions involve similar unfair or anticompetitive practices in selling programming, Section 12 carries a longer statutory deadline for implementation that will allow us to issue separate implementing rules at a later date.

particular conduct that is prohibited by subsection (b). Specifically, the regulations are to:

- (1) establish safeguards to prevent undue influence by cable operators upon actions by affiliated program vendors related to the sale of programming to unaffiliated distributors;
- (2) prohibit price discrimination by vertically integrated satellite cable programming vendors and satellite broadcast programming vendors; and
- (3) prohibit exclusive contracts between a cable operator and a vertically integrated programming vendor in areas that are not served by a cable operator and any such exclusive arrangements in areas served by cable that are not found in the public interest by the Commission.

The statute provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission.

4. The Commission's Notice of Proposed Rulemaking<sup>2</sup> sought comment on various issues pertaining to the intended objectives and scope of the statutory program access provisions, as well as whether the regulations adopted pursuant to Section 628(c) should only implicate those "unfair," "deceptive," or "discriminatory" practices that have the purpose or effect of significantly hindering the access of distributors to programming that are referenced in the more general provisions of Section 628(b). As a related issue, the Commission asked for comment on the geographic market that would be relevant to determining whether a practice causes anticompetitive harm.

5. The Notice also sought comment on matters pertaining to particular practices prohibited by the 1992 Cable Act. Concerning "undue influence" by cable operators upon affiliated programming vendors' sales practices, we asked commenters to address the activities that should constitute "undue influence," and how we could distinguish such practices from other activities that could occur during the normal course of legitimate negotiation.

6. With respect to discrimination among distributors by programming vendors, we asked commenters to identify "discriminatory" pricing practices in comparison to legitimate business strategies for distributing video programming. The Notice observed that the statute permits programming vendors to impose certain requirements to account for different characteristics among multichannel video programming distributors (MVPDs),<sup>3</sup> including cost and

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<sup>2</sup> See Notice of Proposed Rulemaking in MM Docket No. 92-265 (Notice), 8 FCC Rcd 194 (1992).

<sup>3</sup> For the purposes of the regulations to implement Section 628, we will define a "multichannel video programming distributor" as an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well

volume-related factors, and inquired whether other legitimate economic factors may exist to explain price differences that are consistent with the statute. We also sought comment on whether other laws that address price discrimination issues could help guide our analysis when evaluating price differentials.

7. Regarding exclusive program contracts, we sought comment on (1) an appropriate determination of whether an area is served by a cable operator, (2) how to identify the specific arrangements that the restrictions on exclusivity should prohibit, and (3) the factors necessary to determine whether a particular arrangement serves the public interest.

8. Finally, we proposed for comment a streamlined complaint procedure that would expeditiously resolve Section 628 complaints while affording all parties due process. The proposed procedures would require complainants to establish a prima facie case of a statutory violation with respect to programming access. We sought comment on the factors that should constitute a prima facie showing.

## II. SUMMARY OF DECISION

9. In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public. The comments submitted in this proceeding from cable's emerging competitors reflect this fundamental concern. Indeed, various distributors have described numerous situations in which their ability to secure programming has been impaired, either by refusals to sell cable programming by certain vendors, or by discriminatory terms and conditions imposed upon the acquisition of various programming services. Accordingly, in order to fully implement the mandate of the 1992 Cable Act, we are today adopting regulations that proscribe the specific conduct detailed in Section 628. In addition, we are promulgating complaint procedures carefully designed to provide effective relief by placing the least necessary evidentiary burdens on those seeking relief under our program access rules and ensuring a speedy resolution of their complaints.

10. With respect to the entities covered by Section 628, we will follow the plain language of the statute by applying the general prohibition in Section 628(b) against "unfair methods of competition" and "unfair or deceptive acts or practices" to all cable operators, all satellite broadcast programming vendors and vertically integrated satellite cable programmers. Thus, a cable operator or satellite broadcast programmer may become subject to this provision of the 1992 Cable Act even if they are not vertically integrated. By contrast, the more specific proscriptions in Section 628(c) regarding activities that constitute undue influence and discrimination apply to vertically integrated cable operators, vertically integrated satellite cable programmers and all satellite broadcast programming vendors. The restrictions in Section 628(c) on exclusive contracts apply to vertically integrated programmers (cable and

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as buying groups or agents of all such entities.

broadcast) and their contracts with cable operators. Thus, with respect to the specific actions encompassed by Section 628(c), vertical integration is more often an essential element of a complaint.

11. As a general matter, in order to file a complaint regarding discrimination, exclusive contracts, or undue influence under Section 628(c), vertical integration need not exist in the specific market at issue. Rather, the complainant need show only that the relevant programmer or cable operator is vertically integrated in any market. We believe that this approach is most consistent with congressional intent and best addresses Congress' apparent concern with industry-wide influences that can occur even in the absence of a vertical relationship in the complainant's specific market. Moreover, to ensure that all entities with potential incentives to engage in anticompetitive conduct are covered by our rules, we are adopting a fairly strict attribution standard for assessing vertical integration. Specifically, attributable interests will include all voting or nonvoting equity interests of five (5) percent or more. The single majority shareholder exemption and limited partnership insulation criteria used in our broadcast attribution rules will not apply.

12. We will not require complainants alleging violations of the specific prohibitions in Section 628(c) -- regarding discrimination, exclusive contracts, or undue influence -- to make a threshold showing that they have suffered harm as a result of the proscribed conduct. In this regard, we are persuaded that Congress has already determined that such violations result in harm. We do believe, however, that the plain language of the statute requires complainants filing under the general prohibitions in Section 628(b) against unspecified unfair practices to demonstrate that an alleged violation has the "purpose or effect" of hindering significantly or preventing the complainant from providing programming to subscribers or consumers. In these cases, a complaint will not go forward unless the complainant makes a threshold showing of harm.

13. When considering complaints regarding undue influence or discrimination, we will compare the programming arrangement of the complaining distributor against the programming arrangements enjoyed by its competitors. We believe that focusing on the programming terms received by competitors will best serve the underlying objective of Section 628 to remove unfair competitive obstacles and create a level playing field in the market for program distribution. We will define the geographic market for identifying "competing" distributors either locally, regionally or nationally, depending on how the affected distributor buys and delivers programming. Therefore, in order to identify "competing" distributors, we will require potential complainants to compare programming terms with respect to a distributor that has some overlap in actual or proposed service areas.

14. With respect to Section 628(c) (2) (B)'s prohibition against price discrimination in the distribution of cable programming, we believe that Congress has given us ample guidance in the statute itself to determine whether a particular price differential is discriminatory. Accordingly, we will find price discrimination to have occurred if the difference in the price charged to competing distributors is not explained by the statute's permissible factors.

In general terms, these factors involve (1) cost differences at the wholesale level in providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability, or character; and (4) differences in the way the service is offered. The statute's prohibition against discrimination also encompasses non-price discrimination, which we believe could occur through "unreasonable refusals to sell" programming, including instances where a vendor refuses to initiate negotiations, or to offer particular terms, to an individual distributor, or to a class of distributors, when such programming or terms are offered to competing distributors.

15. When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c) (2) (B). As part of its showing that the price offered to the complainant is permitted by the statute, the programmer may submit either a rate card or other contracts it has signed with distributors whom it believes are similarly situated to the complainant. We will define "similarly-situated distributors", for these purposes, as those that operate in the same geographic area, have roughly the same number of subscribers, purchased a similar service, and use the same distribution technology as the distributor with whom the complainant competes and has compared itself. In all cases, the programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors.

16. Regarding the prohibition against exclusive programming contracts set forth in Section 628(c) (2) (C), we conclude that exclusive arrangements between vertically integrated programmers and cable operators in areas not served by a cable operator are illegal per se and may not be justified under any circumstances. Moreover, exclusive contracts in areas served by cable (except those entered into prior to June 1, 1990) may not be enforced unless the Commission first determines that the contract serves the public interest. Because we are unable to find, on the record before us, that any particular class of exclusive contracts can be presumed to serve the public interest, these determinations will be made on a case-by-case basis using the five public interest factors set out in the statute.

17. In order to fulfill Congress' directive that Section 628 complaints be resolved expeditiously, we have developed a streamlined complaint process that will enable us to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner. Our rules will encourage program vendors to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a vendor declines to provide such information, it will be sufficient for a distributor to submit a sworn complaint alleging, upon information and belief, that an impermissible price differential or exclusive arrangement exists, or that other prohibited conduct -- such as undue influence or an unreasonable refusal to sell -- has occurred. The programmer will have the opportunity to refute the charge. Complainants may then submit a reply, after which the Commission will review the pleadings and assess whether the complaint can be resolved on the written record or whether further investigation is required. If further action is necessary, the

staff will have the discretion either to require the submission of further information or, where appropriate, allow discovery and/or designate the proceeding for a hearing before an Administrative Law Judge.

18. We have not adopted "safe harbors", penetration benchmarks or other mechanisms for screening complaints. Thus, for example, any differential in the price paid by one distributor as compared to its competitor may form the basis for a complaint. However, we will impose a higher burden on programmers to defend a price difference if it exceeds either 5 percent or 5 cents per subscriber, whichever is greater. Moreover, to ensure that we are not deluged with insignificant and unsubstantiated Section 628(c) allegations, we will adopt penalties for the filing of frivolous complaints.

19. Finally, given that Congress expressly grandfathered only a narrow class of contracts (those exclusive contracts in cabled areas entered into before June 1, 1990), the rules we adopt today will apply prospectively to existing contracts and to contracts executed after the effective date of the rules. To provide for a reasonable transition period, affected parties will have 120 days after the effective date of our rules in which to bring their agreements into compliance with our regulations.

20. Our decisions with respect to each of the foregoing issues are discussed in detail below.

### III. COVERAGE OF THE STATUTORY PROGRAM ACCESS PROVISIONS

#### Background

21. The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors. The 1992 Cable Act and its legislative history,<sup>4</sup> reflect congressional findings that horizontal concentration in the cable television industry,<sup>5</sup> combined with extensive vertical integration (i.e.,<sup>6</sup> combined ownership of cable systems and suppliers of cable programming),<sup>6</sup> has

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<sup>4</sup> House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 (Senate Report), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992).

<sup>5</sup> For example, the House Report observes that the largest multiple system operator (MSO), TCI, controls access to almost 25 percent of the nation's cable subscribers. House Report at 42.

<sup>6</sup> The legislative history lists 15 of the most popular cable programming services as being owned by cable operators. See Senate Report at 25. The House Report notes that, according to the National Cable Television

created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors (*i.e.*, other cable systems, home satellite dish (HSD) distributors,<sup>7</sup> direct broadcast satellite (DBS) providers, satellite master antenna television (SMATV) systems, wireless cable operators, *etc.*). This imbalance has limited the development of competition and restricted consumer choice. Congress further concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.<sup>8</sup> To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an "attributable" interest and toward satellite broadcast programming vendors regardless of vertical relationships. Thus, an initial issue to be addressed is what entities come within the statutory prescription and whether these entities are to be regulated in their program sales throughout the United States or only in those specific markets or situations where an actual vertical relationship exists.

22. Section 628(b), which sets forth the general prohibition required by the statute, proscribes "a cable operator, a satellite cable programming vendor

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Association, 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. See House Report at 41.

<sup>7</sup> With respect to the term "HSD distributors", many different types of entities in the HSD or television receive-only market purchase satellite programming services from vendors and sell that programming to consumers, while also providing various other services for HSD consumers. For the purposes of the program access regulations, we will use the term "HSD distributor" to refer to all such entities, including those entities that are commonly known as HSD dealers or third-party program packagers. See, e.g., UVI at Exhibit 4 (showing functions of retail sales agents for satellite programming, as well as the unique costs to vendors from delivering programming to the HSD market).

<sup>8</sup> 1992 Cable Act, Section 2(a)(5). See also Senate Report at 24; House Report at 41-45. In Report in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (1990 Cable Report), the Commission similarly concluded that the cable television industry has become increasingly concentrated and vertically integrated, thus providing multiple system operators and vertically integrated cable operators the potential to pursue anticompetitive actions against programming services or competing multichannel providers. The 1990 Cable Report also found evidence that some cable operators have indeed used this potential anticompetitively. For example, alternative distributors presented evidence that some programming vendors refused to sell cable programming, and wireless cable and SMATV operators, HSD distributors, and second competitive cable systems described the discriminatory terms and conditions imposed on their acquisitions of various programming services. See 1990 Cable Report, 5 FCC Rcd 5006, 5008, and 5021. The NPRM also solicited detailed allegations or evidence regarding unfair or discriminatory practices in distributing cable programming to assist in prescribing regulations to govern conduct by programming vendors that may restrict access to programming. See Notice, 8 FCC Rcd 197.

in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" from engaging in unfair practices. Section 628(c) delineates the "minimum contents" of the program access regulations to be adopted by the Commission. The various provisions of Section 628(c) expressly apply to undue influence exerted by "a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor" (628(c)(2)(A)); discrimination by "a satellite cable programming vendor in which a cable operator has an attributable interest, or by a satellite broadcast programming vendor" (628(c)(2)(B)); exclusive contracts in areas not served by cable "that prevent a multichannel video programming distributor from obtaining . . . programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(C)); and exclusive contracts in areas already served by cable between "a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(D)).

23. In the Notice, we tentatively concluded that Section 628 applies only to vertically integrated satellite cable programmers, and sought comment on whether we should similarly restrict application of this provision to vertically integrated satellite broadcast programmers. We further noted that the provisions of Section 628(c) that specifically apply to vertical relationships refer to one party having an "attributable interest" in the other. We thus sought comment on whether to define "attributable interest" with reference to the attribution rules generally applicable to the broadcasting industry, or whether to use a different standard.<sup>9</sup>

#### Comments

24. Vertical Integration. Commenters do not take issue with the Commission's conclusion regarding application of Section 628 to vertically integrated satellite cable programming vendors.<sup>10</sup> Commenters are divided, however, as to whether the statute applies only to satellite broadcast programming vendors that are vertically integrated. In addition, some commenters contend that Section 628 applies to all cable operators, regardless of whether they are vertically integrated. They argue that while 628(c) specifically refers to vertical relationships, the reference to "cable operators" in Section 628(b) is unambiguous in its omission of reference to vertical integration. Other commenters assert, however, that because the provisions of 628(c) apply only to vertically integrated cable operators, then the more general provisions of 628(b) apply only to vertically integrated cable operators.

25. In addition, some commenters argue that entities should only be subject

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<sup>9</sup> Notice, 8 FCC Rcd at 196.

<sup>10</sup> A complete summary of comments regarding all aspects of this proceeding is included as Appendix C.

to the provisions of Section 628 in those markets in which they are vertically integrated, as they would not have the incentive to engage in prohibited practices in markets where they are not vertically integrated. Other commenters disagree, arguing that size and market power can afford vertically integrated cable operators and programmers considerable ability to control programming access in areas where they are not actually vertically integrated.<sup>11</sup>

26. Attribution. Commenters are divided on the issue of determining an attribution standard for identifying "vertically integrated" entities, with most advocating use of something other than the broadcast model. Those commenters supporting use of the broadcast standard generally argue that the Commission has had considerable experience interpreting and implementing the broadcast attribution rules. They also note that the Commission has adopted a five percent attribution threshold with respect to its video dialtone rules and its cable/network cross-ownership rule. Other commenters support a benchmark lower than five percent, arguing that an interest of even less than five percent could be sufficiently significant to lead to the types of incentives about which Congress was concerned in adopting Section 628. On the other hand, commenters proposing an attribution benchmark higher than five percent contend that cable operator investment is necessary to the development of programming services, and several argue that the Commission should establish a standard of 50 percent or more to reflect actual control. In addition, a few commenters contend that an actual control or behavioral standard is preferable to a general numerical cutoff. Further, regardless of what attribution benchmark is adopted, a number of commenters propose exceptions for small cable operators or program services with low penetration. Commenters are also divided on whether the Section 628 attribution standard should incorporate other aspects of the broadcast rule, such as the single majority shareholder rule and the limited partnership insulation criteria.<sup>12</sup>

## Discussion

27. Our regulations regarding program access are designed to prohibit practices that are unfair and discriminatory, in a manner that is faithful to the policy of Congress to: (1) promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; and (4) ensure that cable television operators do not have undue market power vis-a-vis

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<sup>11</sup> WCA argues that in choosing not to limit Section 628 to those vendors that are vertically integrated in a specific market, Congress apparently rejected the Commission's proposal in the 1990 Cable Report to limit program access rights to those markets where the local cable operator has a cognizable interest in the programmer refusing to deal with alternative technologies. See WCA at 31-32.

<sup>12</sup> See 47 C.F.R. § 73.3555 (notes).

video programmers and consumers.<sup>13</sup> In order to best fulfill these objectives, we conclude that our program access regulations should apply to the specific entities enumerated in each provision of Section 628. Moreover, where vertically-integrated entities are involved, we believe that the statutory prohibitions should apply to such entities in all locations, regardless of vertical integration in the particular market.

28. Vertically integrated satellite cable programming vendors. Although other entities are implicated, a principal target of the restrictions contained in Section 628 is the conduct of vertically integrated satellite cable programming vendors. For this purpose, the term "satellite cable programming" means video programming which is transmitted via satellite, other than satellite broadcast programming, and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.<sup>14</sup> The term "satellite cable programming vendor" means "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor."<sup>15</sup>

29. We conclude that the general prohibition of Section 628(b) against unfair practices applies to vertically integrated satellite cable programming vendors, all satellite broadcast programming vendors and all cable operators in all locations, regardless of the existence of vertical integration in the particular market in question. This reading is consistent with the plain language of Section 628(b). While most of the provisions of Section 628(c) specifically apply only to vertically integrated entities, that subsection includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive. Thus, we will reject the suggestion by some commenters that a vertical integration requirement for cable operators or satellite broadcast programmers should be read into Section 628(b).

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<sup>13</sup> See 1992 Cable Act, Section 2(b) (1)-(3), and (5). We note that numerous alternative distributors allege that problems related to program access continue to exist, as they face higher programming rates than cable systems, and encounter restrictions in obtaining programming rights. See, e.g., CSS at 12, 15-16; WCA at 13, 16; CableAmerica at 3; National Cablesystem Associates at 7; NRTC at 18; APPA at 6; DirecTV at 28; People's Choice at 2; Cross Country Reply at 2; Liberty Cable Reply at 6; People's Cable Reply at 2. In response, programming vendors contend that these practices are often legitimately based, as price differentials are often based on necessary considerations, including those factors enumerated in Section 628(c) (2) (B) (i)-(iv), and they claim that the use of exclusive contracts has promoted the development of new and diverse programming services. See, e.g., A&E at 5; Discovery at 6; NCTA at 21; Time Warner at 28; TCI at 13; UVI at 23; Viacom at 19.

<sup>14</sup> See Section 628(i), which incorporates by reference the definition contained in existing Section 705 of the Communications Act.

<sup>15</sup> Section 628(i) (2).

30. Regarding the geographic considerations for vertical integration, we believe that the scope of the rules should not be limited to situations where a satellite cable programming vendor is vertically integrated with a distributor within a particular market. Instead, in order to file a complaint under Section 628, a complainant need only show that the programmer is vertically integrated as a general matter. Although some parties claim that programming vendors would not have the incentive to engage in the prohibited practices in markets where they are not vertically integrated, we believe that the legislative history demonstrates Congress' concern that vertically integrated vendors may control programming access in areas without a commonly owned distributor.<sup>16</sup>

31. Attribution. In assessing vertical integration, we will consider a cable operator to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting. We will not adopt the single majority shareholder aspect of the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. We note that various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question, *e.g.*, whether control, influence or some other aspect of the relationship is involved, and on an evaluation of the costs and risks associated with various levels of ownership or influence. The policy objective involved here, we believe, warrants a relatively inclusive attribution rule.

32. In fact, the rule we are adopting is consistent with the standard we use in the video dialtone context.<sup>17</sup> While some commenters advocated adoption of all aspects of the broadcast attribution rule, we believe that the intent of the video dialtone proceeding is more analogous to the intent of Congress in adopting Section 628, *i.e.*, to curb incentives for influencing behavior of affiliates to the detriment of competitors. We stated in the video dialtone proceeding that "[i]n connection with broadcast/cable cross-ownership, we have determined that 5% ownership is an appropriate threshold for identifying the point at which ownership in a publicly traded entity may create the potential for influence or control."<sup>18</sup> We are concerned that a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute.

33. We also disagree with some commenters' proposal that we adopt a behavioral test for assessing attribution. To provide certainty to the cable industry and the public, it is imperative that we develop a clear directive

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<sup>16</sup> See also 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (Rep. Tauzin).

<sup>17</sup> See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266, 7 FCC Rcd 5781 (1992) (Video Dialtone Order).

<sup>18</sup> Video Dialtone Order, 7 FCC Rcd at 5819.

with respect to which entities will be deemed subject to the statute and our implementing rules. A behavioral test is necessarily ad hoc and therefore would not provide sufficient certainty.<sup>19</sup>

34. Non-vertically integrated satellite broadcast programming vendors. Vertical integration is not a requirement for applying the provisions of Section 628 to satellite broadcast programming vendors. For these purposes, the term "satellite broadcast programming vendor" means "a fixed service satellite carrier that provides service pursuant to [the compulsory licensing provision of section 119 of the Copyright Act], with respect to satellite broadcast programming."<sup>20</sup> The term "satellite broadcast programming," in this context, means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster."<sup>21</sup>

35. There appears to be little serious dispute as to the application of Section 628 to all satellite broadcast programming vendors. Although program distributors of this type are not subject to the conflicting incentives associated with vertical integration, they effectively sell a satellite relay capacity rather than programming, since compensation for the programming involved is covered by the compulsory licensing provision of the Copyright Act. In this role, the rationales for differential pricing have been viewed somewhat differently and, based on the statutory coverage, apparently were not thought by Congress to be associated with vertical integration issues.

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<sup>19</sup> We note that several commenters urged that we adopt an exemption from our attribution standards for a programming vendor whose aggregate subscriber base from its affiliated cable owners represents less than five percent (or some other small number) of its total program subscribership, arguing that such a vendor would have little incentive to engage in anticompetitive behavior because its affiliated customers purchase such a small percentage of the vendor's service. We decline to adopt such an exemption at this time because the record does not provide sufficient data to support a definitive point at which the incentives for such vendors to favor their affiliated customers differ from other vertically integrated programming vendors. We emphasize, however, that we could revisit this issue generally to the extent that parties are able to provide information regarding the incentives and past conduct of vendors with de minimis vertical interests. Similarly, to the extent that certain parties advocated a more flexible attribution standard for minority-owned cable programmers, we could revisit this attribution standard, to the extent that it is consistent with this section of the 1992 Cable Act, and would promote minority programming.

<sup>20</sup> Section 628(i) (4).

<sup>21</sup> Section 628(i) (3).

#### IV. UNFAIR METHODS OF COMPETITION AND DECEPTIVE PRACTICES

##### Background

36. Section 628(b) provides that:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

37. The provisions of Section 628(c) that follow this general prohibition make it clear that certain types of exclusive contracting, undue influence among affiliates, and discriminatory sales practices are to be treated as unfair methods of competition or unfair or deceptive acts. In the Notice, we sought comment on whether Congress intended for the Commission to regulate any additional "unfair methods of competition or unfair or deceptive acts or practices" beyond those specifically referenced in subsection (c). In particular, we asked whether other practices that are precluded by the various antitrust laws -- such as refusals to deal or "tying" arrangements -- are encompassed within the terms of Section 628 and warrant Commission regulation. We also noted that the language of Section 628(b) itself addresses only practices that are (i) "unfair," "deceptive," or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers. Moreover, because practices that a particular competitor might consider "unfair" or "discriminatory" may not significantly harm competition generally in distributing multichannel video programming, we questioned whether our analysis should consider harm to (i) consumers, measured by the amount or availability of programming to consumers in the market; (ii) other distributors in the market; or (iii) both consumers and distributors.

##### Comments

38. Commenters focus much of their discussion of Section 628(b) on the questions relating to harm in paragraph 10 of the Notice. Essentially, two points of view emerge. One view is that Section 628(b) broadly affords distributors an umbrella of protection from unfair conduct by programmers independent of the practices specifically prohibited in Section 628(c). The alternate view is that Section 628(b) favors programmers because it establishes the additional requirement that practices specifically prohibited under Section 628(c) must also violate Section 628(b) before they are actionable.<sup>22</sup> With respect to filing complaints under Section 628(b), a number

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<sup>22</sup> Compare, e.g., CableAmerica at 14 (Section 628(b) broadly states congressional intent to bar practices by programming vendors that hinder the distribution of video programming, while the minimum contents of regulations to execute this goal are set forth in Section 628(c)), with NCTA at 7 (conduct

of commenters argue that an aggrieved distributor will have little information on which to base specific allegations of misconduct by a programmer and will be unable to provide detailed explanations of the facts tending to establish a violation absent opportunities for disclosure and discovery. Consequently, they assert, there should be a low threshold for making a prima facie case under Section 628(b).<sup>23</sup>

39. Regarding the burden of proof that a distributor must show in a Section 628(b) proceeding, CableAmerica contends that the complainant would have to make out a prima facie case that a programming vendor or cable operator was engaging in unfair competition or unfair or deceptive acts or practices. Where the complaint did not establish an anticompetitive purpose, CableAmerica asserts, the complainant would also have to establish a prima facie case that the practice prevented or significantly hindered the operator in providing programming to consumers.<sup>24</sup> The burden of proof would then shift to the respondent, which is in a better position to justify its conduct. UVI, however, argues in favor of more stringent requirements for a prima facie case. It contends that the Commission should require the complainant to provide specific real evidence of the complained actions and their effects to show that the program vendor's activities significantly hinder program distribution in the marketplace.<sup>25</sup>

#### Discussion

40. Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified "unfair practices" prohibited by Section 628(b) beyond those more specifically referenced in Section 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.

41. Thus, although the types of conduct more specifically referenced in the statute, *i.e.*, exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to

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that is determined to be unfair under Section 628(c) is not prohibited by Section 628(b) unless it also prevents or significantly hinders a distributor from providing programming). The question of harm with respect to those practices identified in Section 628(c) will be addressed separately below.

<sup>23</sup> See, *e.g.*, WCA at 44.

<sup>24</sup> See CableAmerica at 41; see also Attorneys General at 14 (complainant must provide substantial evidence that the programming contract contains anticompetitive terms which have the "effect" of significantly hindering or preventing program availability).

<sup>25</sup> UVI at 37-39.

adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard, it is worth emphasizing that the language of Section 628(b) applies on its face to all cable operators. Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." In particular, the complainant must show that its ability to distribute programming to customers has been hampered in some fashion.<sup>26</sup> Parties filing complaints under this provision must use the procedures and statute of limitations established below for violations of Section 628(c) (2) (A) regarding undue or improper influence.

## **V. COMPETITIVE HARM OR HINDRANCE TO ACCESS AS AN ELEMENT OF RULES**

### **Background**

42. Before turning to the specific rules that we are adopting related to undue influence, discrimination, and exclusive contracting prohibited by Section 628(c), there is one issue of general applicability that warrants discussion at the outset. As noted in the preceding section, the general prohibition in Section 628(b) precludes conduct "the purpose or effect [of which] ... is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." We have thus concluded that parties bringing complaints under Section 628(b) must demonstrate how the allegedly unfair practice has hampered or prevented the distribution of programming. A related question asked in the Notice was whether a similar showing of "harm" must be made by complainants seeking relief under the more specific provisions of Section 628(c).<sup>27</sup>

### **Comments**

43. Some commenters contend that Section 628 only prohibits conduct that is both "unfair" and causes "harm" and that the rules adopted should have parallel

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<sup>26</sup> We note that our analysis of the hindrance in the context of an alleged unfair practice will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors.

<sup>27</sup> Notice at 196. Specifically, we asked commenters to identify (i) how a prohibited behavior hinders an MVPD from providing programming to subscribers or consumers; (ii) what evidence, if any, a complainant should be required to provide to show that the behavior has prevented it from carrying this or any other programming; and (iii) what evidence, if any, a complainant should be required to provide to show that the behavior threatened its viability because of the behavior's ultimate detrimental impact on consumers. Notice at n. 26 (emphasis added).

requirements.<sup>28</sup> For example, these commenters argue that price discrimination by a programmer -- even though it is specified as a form of prohibited unfair practice under 628(c) (2) (B), and even though a price differential may be unjustified by the four enumerated exceptions -- should not constitute prohibited conduct in any particular case unless it significantly hinders the ability of a multichannel distributor to compete in providing programming to subscribers.<sup>29</sup> With respect to the degree of injury that a distributor must show, a number of commenters propose that the alleged unfair practice must have sufficiently hindered the distributor's ability to provide comparable programming so that its ability to compete is substantially impaired.<sup>30</sup> Finally, a number of commenters argue that since Congress contemplated that harm was caused primarily by vertically integrated entities, our rules should exempt any conduct, pricing mechanism, or other term or condition also imposed by non-vertically integrated entities, as well as any conduct by vertically integrated entities that is similar to that of non-vertically integrated entities.<sup>31</sup>

44. However, many commenters disagree with these interpretations and contend that there is no requirement in the statute that the Commission impose a threshold showing of harm to competition.<sup>32</sup> These commenters argue that requiring complainants to meet a threshold showing of harm in Section 628(c) -- where none was intended with respect to exclusive contracts and discrimination -- would undermine the goals Congress sought to achieve in implementing these provisions.<sup>33</sup> In their view, Section 628(b) broadly states congressional intent to prohibit practices by video programming vendors that hinder the distribution of video programming. To effectuate this goal, Congress set forth in Sections 628(c) (2) (A)-(D) specific practices that the Commission's regulations, at a minimum, must prohibit.<sup>34</sup> The commenters thus argue that the proper reading of the statute provides that these practices, unless explicitly justified under the exceptions enumerated in subparagraphs (i)-(iv) of Section 628(c) (2) (B), violate the statute, and that no showing of

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<sup>28</sup> See, e.g., Landmark at 5.

<sup>29</sup> See NCTA at 8.

<sup>30</sup> See, e.g., Discovery Reply at 5. Liberty Media further suggests that when a distributor obtains programming at more favorable prices than does a complainant, and this disparity is reflected in the favored distributor's lower retail prices to consumers, the complainant's ability to compete may be impaired. Liberty Media at 5-7.

<sup>31</sup> See, e.g., UVI at 16.

<sup>32</sup> See, e.g., DirecTV Reply at 2-3.

<sup>33</sup> See, e.g., CableAmerica at 14.

<sup>34</sup> See, e.g., DirecTV at 3-4.

harm is required.<sup>35</sup>

45. Several commenters note that the approach suggested in the Notice ignores the fact that the 1992 Cable Act allows for relief where conduct has the "purpose" of hindering or preventing an MVPD from providing programming, not just where it has that "effect."<sup>36</sup> Furthermore, a number of commenters criticize the cable industry's stance on harm, arguing that the statute does not require a complainant to prove that a prohibited practice has the effect of causing significant harm to competition (rather than solely to the complainant), or that the viability of its operation is threatened before the complainant may challenge a programmer's unfair practices.<sup>37</sup>

## Discussion

46. In analyzing Section 628, it is clear that Congress intended for the Commission to regulate program access practices in a manner that would remedy (and thus eliminate) unfair and anticompetitive behavior. Accordingly, in the Notice, we sought to develop a complete record concerning the proper interpretation of the specific language Congress adopted. As noted above, the commenters discussed this issue at length, and the record shows that either of two interpretations could be supported by the express language of the statute. One interpretation of the words of Section 628 is that subsection (b) generally proscribes anticompetitive behavior that causes harm to MVPDs, and that subsection (c) defines specific conduct which the Commission's rules must prohibit and which Congress has already determined causes anticompetitive harm.<sup>38</sup> Alternatively, because subsection (c) requires the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)," it is possible to read subsection (b)'s limitations as equally applicable to the behavior specified in subsection (c), such that the conduct specified in subsection (c) is only prohibited if it is shown to "hinder significantly or prevent" any MVPD from providing programming.<sup>39</sup>

47. Looking to the legislative history, we note that the program access provisions were introduced as an amendment to the then pending House cable bill (H.R. 4850) by Representative Tauzin on July 23, 1992. On the same day,

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<sup>35</sup> See, e.g., NRTC at 13.

<sup>36</sup> See, e.g., CSS Reply at 3.

<sup>37</sup> See, e.g., CableAmerica at 16-17 (discussing para. 10 and n. 26 & 27 of the Notice).

<sup>38</sup> See, e.g., DirecTV Reply at 2-3, APPA at 13-18, CableAmerica at 14-18, CSS at 14.

<sup>39</sup> Some commenters argue that the complainant must show that it has been harmed; others contend that the complainant must show that harm to the video programming distribution market in general has occurred. See, e.g., E! at 5, Landmark at 5, Liberty Media at 7, NCTA at 7, Rainbow at 33, TCI at 5-10 and 31-32.

Representative Manton offered a competing amendment that would have prohibited a vertically integrated programming vendor from refusing to deal with a competing MVPD if such refusal to deal would "unreasonably restrain competition" (emphasis added).<sup>40</sup> The Manton amendment apparently contemplated that the Commission would make a determination of anticompetitive harm in each complaint case. The Manton amendment, therefore, specifically imposed on complainants a higher burden than the Tauzin amendment.<sup>41</sup> The Tauzin amendment, however, was ultimately adopted, with minor modifications, and is now Section 628 of the 1992 Cable Act.<sup>42</sup> Thus, the legislative history indicates that Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c). We conclude, therefore, that the language in subsection (b) was not intended to impose an additional burden or threshold showing on complainants with respect to the activities specified in subsection (c). Rather, we believe that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.<sup>43</sup>

48. We note that this treatment of "harm" is common in FCC regulation. Our rules, for example, require licensees to keep their towers properly painted and lit; a violation occurs even if no one is damaged as a result of the licensee's failure to comply with our rules. We believe that Congress adopted a similar stance with respect to the specific practices proscribed by Section 628(c). In each case, a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited.

49. Therefore, we will not impose a threshold burden of demonstrating some form of anticompetitive harm on a complainant alleging a violation of Section 628(c). As noted in the preceding section, however, for those complainants alleging a violation of a general "unfair practice" prohibited by Section 628(b), consistent with the express statutory language we will require the complainant to demonstrate that the purpose or effect of the conduct complained of was to "hinder significantly or to prevent" an MVPD from providing

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<sup>40</sup> Congressional Record (July 23, 1992) at H6531 - H6543.

<sup>41</sup> See DirecTv at 4.

<sup>42</sup> See DirecTv Reply at 3, n.2 (discussing the modifications made to Rep. Tauzin's original proposal).

<sup>43</sup> In other words, if a price differential, or the magnitude of a particular price differential, between competing MVPDs cannot be justified under the statutory allowances, then discrimination has occurred, and a finding of harm is implicit. Similarly, if a vertically integrated programming vendor enters into an exclusive contract with a cable operator that governs an unserved area, or an exclusive contract governing a served area that does not meet the statutory public interest standard, a finding of harm is implicit.

programming to subscribers or customers.<sup>44</sup>

## VI. LIMITATIONS ON EXCLUSIVE CONTRACTING

### Background

50. As indicated above, the Commission is directed to prescribe program access regulations to specify particular conduct that is prohibited in three specific areas. The record in this proceeding reveals that there are two key areas of concern for cable competitors. First, a number of MVPDs assert that they have been unable to secure certain programming at all because programming vendors have exclusive contracts with cable operators, even in areas not currently served by cable. The first area we address thus relates to limitations of exclusive contracting. Second, even where MVPDs have been able to gain access to programming, they contend that they must pay unreasonably high prices for it. We accordingly will next turn to a discussion of the price discrimination prohibitions of Section 628(c) (2) (B). Finally, we address the prohibition against "undue influence" in Section 628(c) (2) (A), which received much less attention in the record.

51. Section 628(c) (2) (C) requires the Commission to develop rules that prohibit practices, understandings, arrangements, and activities, including exclusive contracts between cable operators and vertically integrated satellite cable and broadcast programming vendors, that prevent an MVPD from obtaining satellite cable or satellite broadcast programming for distribution to persons in areas not served by a cable operator as of the date of enactment of the 1992 Cable Act. Section 628(c) (2) (D) requires the Commission to prohibit such exclusive contracts in areas served by a cable operator unless the Commission determines that the exclusive contract is in the public interest pursuant to Section 628(c) (4). Section 628(h) exempts exclusive contracts, relating only to areas served by a cable operator, that were entered into on or before June 1, 1990 until such time, after October 5, 1992, as they are renewed or extended. Pursuant to Section 628(c) (5) the restrictions in Section 628(c) (2) (D) cease to be effective 10 years after enactment unless the Commission finds their continuation necessary "to preserve and protect competition and diversity in the distribution of video programming."<sup>45</sup>

52. In the Notice, we sought comment on a number of issues related to the implementation of these provisions. First, we questioned whether Section

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<sup>44</sup> Because we will not impose a threshold showing of harm on complainants filing under Section 628(c), we need not determine whether we should exclude entities with relatively small market shares from this standard. See Notice at 196. Moreover, because the record does not sufficiently support such an exemption, we will not establish such an exclusion for complainants with small market shares filing complaints under Section 628(b). Thus, any complainant alleging that specific behavior violates subsection (b) will be required to demonstrate anticompetitive harm as discussed above.

<sup>45</sup> See 1992 Cable Act §§ 628(c) (2) (C) and (D), § 628(c) (4), and § 628(h).

628(c) (2) (C) should be interpreted as a per se prohibition against exclusive contracts in areas unserved by a cable operator.<sup>46</sup> Next, we sought comment on the appropriate determination of whether an area is served by a cable operator, and how we should define "area."<sup>47</sup> We also questioned what other "practices, understandings, arrangements and activities . . . that prevent a multichannel video programming distributor from obtaining [satellite cable or satellite broadcast] programming" should come within the scope of our rules.<sup>48</sup> In particular, we asked commenters to address particular practices identified in our 1990 Cable Report to Congress, such as subdistribution arrangements.<sup>49</sup> In addition, we questioned whether the provisions of Section 628 impose any duty on a programmer to deal with non-affiliated programming distributors.<sup>50</sup>

53. Next we sought comment on whether any objective standards or benchmarks can be developed to assess the criteria set forth in Section 628(c) (4) to determine whether an exclusive contract in an area served by a cable operator is in the public interest, and whether any factors beyond those specified could be considered, such as specific benefits to exclusivity.<sup>51</sup> In particular, we asked commenters to identify specific instances where we could establish in advance that exclusive distribution arrangements were presumptively in the public interest, such as those related to the development or launch of a new programming service, so long as they were appropriately limited by rule (e.g., a two year limitation on the duration of an exclusive contract for a new program service).<sup>52</sup> Finally, noting that Section 628(c) (4) (D) refers to the effect of an exclusive contract on diversity in the "multichannel video programming market," we questioned whether we should apply a local and/or national market focus to this criterion, or whether some other market analysis was intended.<sup>53</sup>

#### Comments

54. General. Numerous commenters urge the Commission to recognize and confirm that exclusivity is a legitimate means of competition, in that it encourages the creation, promotion and distribution of new programming, thus

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<sup>46</sup> Notice at 201.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Notice at 202.

<sup>52</sup> Id.

<sup>53</sup> Id.

serving the public interest.<sup>54</sup> Others contend that Congress views exclusive contracts in the cable area as a barrier to entry that harms competitors and should only be allowed in limited circumstances.<sup>55</sup> Most commenters agree that Section 628(c) (2) (C) constitutes a per se prohibition against exclusive contracts in areas not served by a cable operator.<sup>56</sup> Others contend that exclusive contracts in unserved areas are only unlawful if they have caused anticompetitive harm to the complainant, or that exclusive contracts should be permitted with any MPVD, including a cable operator, that is the first to provide video services to an unserved area.<sup>57</sup>

55. Several commenters state that the "area served" should be wherever a cable system actually passes a home or where a home can be connected to the cable system for the standard connect fee.<sup>58</sup> Others argue against a home-by-home analysis.<sup>59</sup> One commenter argues that an area is "served" if a home can be connected to either a wired or wireless system.<sup>60</sup> One commenter argues that Section 628(c) (2) (C) does impose on vertically integrated programming vendors a duty to deal with non-affiliated MVPDs, and one commenter argues that it does not.<sup>61</sup> Those commenters addressing what other practices should be prohibited under Section 628(c) (2) (C) basically agree that practices that have the same effect as exclusivity should be regulated, such as substantial rate differentials, time delay provisions, and restrictive subdistribution agreements.<sup>62</sup>

56. Numerous commenters argue that exclusivity should be determined to be presumptively in the public interest for launching and promoting new programming services, but offer varying time periods for an appropriate

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<sup>54</sup> See, e.g., Liberty Media at 47, NCTA at 48, TCI at 24-25.

<sup>55</sup> See, e.g., U.S. West at 8, TRAC at 3.

<sup>56</sup> See, e.g., NRTC at 28, NPCA at 25.

<sup>57</sup> See, e.g., Time Warner Reply at 38, NCTA at 40; Cablevision Reply at 5.

<sup>58</sup> See, e.g., DirecTV at 28, NRTC at 28.

<sup>59</sup> Time Warner Reply at 18.

<sup>60</sup> CCWCO at 4. The Attorneys General, however, argue that only the presence of wired cable operators is relevant. Attorneys General at 12.

<sup>61</sup> NYNEX at 13; Time Warner at 41-42.

<sup>62</sup> See, e.g., Discovery at 27, WJB at 16, CCWCO at 4. Time Warner argues that the Commission should not, at this time, exercise its authority to regulate practices other than exclusive contracts, and further argues that subdistribution agreements are an effective means of program distribution. Time Warner at 38-40. Other commenters propose specific limitations on the terms of subdistribution agreements that would prevent overly restrictive or anticompetitive effects. See, e.g., NPCA at 19-20.

permissible duration for such exclusivity.<sup>63</sup> Others respond that exclusivity is not necessary for new services because they need to be distributed as widely as possible.<sup>64</sup> In addition, some commenters argue that exclusivity should be presumptively permissible for introducing existing services to new markets.<sup>65</sup> Finally, many of the commenters offer specific examples of factors that should be considered and standards that should be applied to determine whether an exclusive contract in a served area is in the public interest.

57. Enforcement. With respect to procedural issues, numerous commenters argue that the statute requires the Commission to review and approve all exclusive contracts, and that the benefits derived from such an approach outweigh any regulatory burden.<sup>66</sup> Others argue that prior review is not required or permitted, and that such micro-management will cause extensive delays that will destroy what the Cable Act did not intend to eliminate.<sup>67</sup> Others suggest that the Commission rely on the complaint process to enforce the exclusivity provisions.<sup>68</sup>

58. With respect to the complaint process, some commenters assert that each factual allegation in a complaint should be supported by affidavits or relevant documents.<sup>69</sup> Numerous parties, however, discuss the unavailability of necessary information to potential complainants.<sup>70</sup> They argue that any requirement that a complainant support its allegations with detailed evidence is feasible only if the FCC establishes a mechanism outside the complaint process for obtaining information.<sup>71</sup> Others suggest some form of pre-complaint discovery.<sup>72</sup> Alternatively, commenters propose that the threshold for establishing a prima facie case must be sufficiently low to take into account the unavailability of supporting information to complainants.<sup>73</sup> For example, a complainant could be required simply to provide affidavits or other documentary

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<sup>63</sup> See, e.g., Liberty Media at 50; Continental at 21; Turner at 5-6.

<sup>64</sup> See, e.g., NSPN at 12; CableAmerica at 8.

<sup>65</sup> See, e.g., ARCC at 17; Cablevision Reply at 5; Liberty Media at 50.

<sup>66</sup> See, e.g., WCA at 43; APPA at 19; TRAC at 4; Bell South at 10.

<sup>67</sup> See, e.g., Time Warner Reply at 20; NCTA Reply at 41; Cablevision Reply at 5.

<sup>68</sup> See, e.g., Discovery at 28.

<sup>69</sup> See, e.g., Liberty Media at 59.

<sup>70</sup> See, e.g., DirecTV Reply at 11; CATA at 8; WJB at 17 and reply at 13.

<sup>71</sup> See, e.g., APPA at 27.

<sup>72</sup> See, e.g., Attorneys General at 13.

<sup>73</sup> See, e.g., WCA at 44.

evidence to support its belief that a prohibited exclusive contract exists, and the burden of proof would shift to the defendant to refute its existence or justify that exclusivity is in the public interest.<sup>74</sup>

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<sup>74</sup> See, e.g., CableAmerica at 40-41; CCWCO at 47.

## Discussion

### A. Exclusive Contracts in Areas Not Served by Cable

59. Section 628(c) (2) (C) is specific in mandating implementing regulations that prohibit "practices, understandings, arrangements, and activities, including exclusive contracts" between cable operators and vertically integrated satellite cable programming vendors or satellite broadcast programming vendors that prevent MVPDs from obtaining such programming for distribution "in areas not served by a cable operator as of the date of enactment of this section." The statute is unequivocal in this regard and thus the rules adopted will provide that such practices constitute a per se violation. As indicted in the Conference Report, an area "served" by a cable system is defined as "an area actually passed by a cable system and which can be connected for a standard connection fee."<sup>75</sup>

60. We note that some commenters questioned how the Commission would treat exclusivity provisions in contracts that cover both served and unserved areas. Given that the statute specifically exempts exclusive contracts in served areas that were entered into on or before June 1, 1990, but specifically excludes exclusive contracts in unserved areas from this "grandfathering," we believe that congressional intent is clear. Thus, if the contract predates June 1, 1990, exclusivity in the served areas is permitted, but is prohibited in unserved areas.<sup>76</sup>

61. As for "other practices, understandings, arrangements and activities" that should come within the scope of our rules, we agree with those commenters who believe that any behavior that is tantamount to exclusivity should be prohibited in unserved areas. Any other interpretation would undermine the goals Congress sought to achieve by prohibiting exclusivity itself. Thus, our rules will prohibit vertically integrated programmers from engaging in activities that result in de facto exclusivity, or from imposing requirements on MVPDs that prevent or restrict them from delivering their programming to any unserved area.

### B. Exclusive Contracts in Areas Served by Cable

62. Section 628(c) (2) (D) treats exclusive contracts between vertically integrated programming vendors and cable operators in areas served by cable in a somewhat less restrictive manner. Contracts of this type are to be prohibited unless the Commission determines that "such contract is in the public interest." In making this judgment, the Commission is to consider each of the following factors with respect to the effect of such contract on the distribution of video programming in that area:

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<sup>75</sup> Conference Report at 93.

<sup>76</sup> We will utilize a case-by-case approach for determining appropriate remedies for situations in which a competing MVPD seeks to obtain programming for an area that includes portions of a served area in which an exclusive contract is grandfathered.